(22)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 677

WILLIAM FRASER, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

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THE DAILY NEWS

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WILLIAM FRASER, Petitioner

VS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Petitioner, William Fraser, prays this Court to review on Writ of Certiorari a judgment of the United States Circuit Court of Appeals for the Sixth Circuit, in a case there entitled, William Fraser, Appellant, vs. United States of America, Appellee.

The Circuit Court of Appeals filed its Opinion on

Oct. 10, and on the same date entered an order reversing the judgment of the United States District Court for the Western District of Tennessee, at Memphis, as to Counts 1 and 4 of the Indictment, and affirming said Court as to Count 3 of the Indictment, and remanding for correction of judgment in accordance.

Petitioner was tried on Oct. 14, 1943, in the United States District Court at Memphis on an Indictment of four counts, changing perjury based on Sec. 125 of the Criminal Code, (18 USCA 251). By direction of the Court the jury returned a verdict of not guilty on Count 2; and as to the other Counts the verdict was guilty on each one. R. p. 22.

Oct. 22, 1943, the District Court rendered judgment imposing a sentence of Five years imprisonment on each of Counts 1, 3, and 4, to run concurrently; and also a fine of $2000.00 on each of said Counts, and to pay the costs. R. pp. 31-33.

This judgment overruled Petitioner's Motion for New Trial, which contained the following grounds, to-wit:

V

First:

"The Court erred in failing and refusing to charge the defendant's special instruction No. II, in words and figures as follows, to-wit:

" You are instructed that you cannot convict the defendant on the uncorroborated statement of any one witness. A conviction of perjury must be based upon testimony of two or more witnesses, or if only by one witness, then such witness must be corroborated by other substantial evidence."

because this was, and is, the law applicable to this case, and was vital and necessary to the proper guidance of the jury, in consideration of the issues submitted to them."

Motion for New Trial R. pp. 23-30, at p. 26.
Special Request for Instruction No. II, R. p. 459.

Petitioner on Oct. 25, 1943, filed his Petition for appeal to the Circuit Court of Appeals, and assigned among other grounds this item V of his Motion for New Trial.

Petition for Appeal R. pp. 35-42 at p. 38.

The Court of Appeals held the refusal of the Trial Court to give this specially requested instruction to the Jury was erroneous, and on this ground reversed the District Court on Counts 1, and 4 of the Indictment; but as to Count 3, held that the error was not prejudicial, in the following language, to-wit:

"As to Count 3, the evidence consisted of; the stipulation that the mortgage had in fact been paid, Fraser's admission that he did pay it off and corroborative testimony of the two bankers with supporting documents, tending to show that a checking transaction between Fraser and the lien holder for the amount of the mortgage had cleared through the banks on the day stated. We think the evidence as to this count, consisting as it did of Fraser's admission or confession and the corroborative testimony of the bankers was such that it was unaffected by the failure of the Court to give special request No. 2 (Pawley vs. United States, 47 Fed. (2d) 1024 (C. C. A. 9) and the judgment as to this count is affirmed."

Circuit Court of Appeals Opinion p. 11.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted for alleged false testimony given by him as a witness in civil suits pending in the United States District Court at Memphis, in which he was a defendant, and P. M. Barton et al plaintiffs; also the United States had intervened as plaintiff; and the effort was to discover the proceeds of certain cotton which Defendant, **as a representative of G. H. Britton Cotton Company,** had purchased and resold. **But the Cotton Company received all the proceeds of the sale,** 60 days or so later turning over to defendant in money and bonds some $30,000.00, supposedly of such proceeds. R. pp. 243-244. All of this defendant fully accounted for R. p. 244, but the plaintiffs had the notion that he should likewise account for some $17,000.00 received from another lot of cotton purchased by the defendant for the account of said Cotton Company from Ellis and Edwards, and on which there were no penalties.

See Count 4 of the Indictment. R. pp. 13-15.

Petitioner took the position which he yet holds that **this $17,000.00 was not proceeds of the Barton cotton,** but came from other cotton not involved in the civil suit, as stated, known as the Ellis and Edwards or Leftwich cotton. R. pp. 244-245.

After the $30,000.00 alleged proceeds of Barton cotton were accounted for and turned over to the Clerk of the Court, Petitioner is further plied with questions as to what he had done with this $17,000.00, and it is in that connection that the testimony involved in Count 3 is given. This testimony is as follows, being taken from the indictment, to-wit:

"Q. Mr. Fraser, did you pay off the balance of the indebtedness on your home in 1942?

A. I will answer you this way . . .

Q. Just answer my question.

A. Did we pay it off in 1942?

Q. Did you pay off the balance of the indebtedness on your home in 1942?

A. **I don't know.** I made a trade, and I think these people reduced the indebtedness to around $2,500.00 or $2,600.00. That was made in 1940 or 1941.

Q. Are you sure it wasn't made in 1942?

A. No, 1940 or 1941.

Q. Whom did you make that trade with?

A. Brigance. He was sick, and they didn't have any money.

Q. Where is he?

A. He is dead.

Q. Who have you been paying the money to?

A. Mrs. Brigance.

Q. You haven't paid anything since 1940 or 1941?

A. **I haven't; no."**

Indictment, Count 3, R. pp. 11-12.

The indictment alleges this testimony was false because on or about September 28, 1942, petitioner signed a check which was used to pay off a mortgage indebtedness then existing against his home.

We quote from the Stipulation of Facts used on the trial:

III.

"It is further stipulated and agreed that the said William Fraser and his wife, Katie May Fraser, executed a mortgage deed of trust to Union Planters National Bank & Trust Company, Trustee, dated April 7, 1941, and that the same was filed for record on April 7, 1941, in the Register's Office of Shelby County, Tennessee, where same now appears of record in Book 1707, page 305; and that said mortgage deed of trust was released of record by marginal release dated and filed for record in said Register's office on September 28, 1942, where the same now appears of record, said marginal release being executed by C. A. Tindall as the true and lawful holder of the claim secured by said mortgage deed of trust."

R. p. 49.

We quote from the testimony of petitioner on his trial in this case:

"Q. Count three refers to your being asked about paying a mortgage?

A. Yes, sir.

Q. At the time you made that statement, had you previously had a mortgage, and had you paid it off?

A. Yes, sir.

Q. Is that in the nature of a deed of trust given by yourself and your wife to Stanton Abernathy and E. M. Bell?

A. Yes, sir.

Q. They are named as trustees?

A. Yes, sir. It was purchased from Mr. and Mrs. G. W. Brigance.

Q. Will you please file that deed of trust as an exhibit to your testimony?

A. I do, sir.

(The document referred to was thereupon received in evidence, and Marked Exhibit No. 9—Fraser, and will be found among the exhibits.)

Mr. DRAPER: Are you introducing a 1941 instrument.

MR. DAVIS; I am introducing a deed of trust.

MR. DRAPER: There is no controversy about that, but there is no need for encumbering the record, because this instrument was satisfied in 1941, long before any of these transactions happened. It is a renewal.

MR. DAVIS: The mortgage reflects the fact that it was released and satisfied in full the 7th day of April, 1941.

A. That's right.

Q. That's when it was cancelled?

A. Yes, sir.

Q. Is that the mortgage you were referring to at the time?

A. Yes, sir.

Q. Was there another mortgage on the property at the time you were talking about that?

A. Yes, sir.

Q. What was that for, and did you recall it at that time?

A. **I did not.** Mr. Farrar was questioning me, and I told him **that I didn't know,** that my recollection had been ordinarily good heretofore, but that if he wanted it, **I would go back home and get the mortgage, if it existed, and bring it to him.**

Q. **You told him you had to refer to your records?**

A. **Yes, sir.**

Q. Mr. Fraser, did you intend, by that statement, to mislead anyone about that mortgage proposition?

A. No sir, I did not. I believe I have a little more gumption than to try to do anything like that.

R. pp. 241-243.

Cross-ex.

Q. With respect to your paying off the mortgage on your house, you did, did you not, on the 28th day of September, 1942, personally go to the Bank of Commerce and issue a check in the sum of $3,175.55?

A. I don't think I went to the Bank of Commerce.

Q. Did you issue a check on your account at the National Bank of Commerce on the 28th day of September, 1942, on which a cashier's check was issued, and which cashier's check in the sum of $3,175.55 was turned over to the account of C. A. Tindall in satisfaction of the balance due on your home out there where you now live?

A. I saw the check, and I know it is true that I did give a check. **At the time I gave the check, I had no knowledge of it.**

Q. Had what?

A. **No knowledge.**

Q. You mean you were unconscious?

A. **I don't know whether I was or not, but I went to the hospital two days afterward, bleeding badly, and I don't recall that check**, but it is a fact that I did pay off mortgage on my home at that time.

Q. And you paid it out of the money you received in the transactions about which you testified?

A. That's right.

Q. That is, you paid it out of the money you received in your transactions with Barton, that is, either directly with the Barton money, or money that came from the sale of the Leftwich cotton?

A. It wasn't Barton money; proceeds of the Leftwich transaction."

R. pp. 260-261.

The only other testimony in the record about the matter, is that given by J. D. Stovall, and W. G. Pegg, government witnesses, and a digest of their testimony will be adequate.

J. D. Stovall. R. pp. 92-100.

He was assistant cashier of National Bank of Commerce, Memphis, and brought records and testified therefrom, that on Sept. 28, 1942, a check on the account of William Fraser for $3,175.55, purchased a cashier's check on said bank, for said amount, which was payable to the First National Bank of Memphis, and records of Mr. Fraser's account reflected this fact. The cashier's check bore the endorsement, to-wit:

"Cashier's check issued to C. A. Tindall", O. Ked by one of the clerks at the First National Bank.

W. G. Pegg, R. pp. 101-103

He was auditor of First National Bank of Memphis, and brought records and showed that cashier's check issued by National Bank of Commerce, Memphis, Sept. 28, 1942,

for $3,175.55 was used to purchase a cashier's check for said amount on the First National Bank of Memphis, and that same was deposited to the account of C. A. Tindall in that bank on Oct. 1, 1942.

JURISDICTION OF THIS COURT.

Jurisdiction of this Court is based on Section 240 (a) of the Judicial Code (28 USCA. 347 (a)), as amended.

SPECIFICATION OF ERRORS

Your Petitioner respectfully submits that the Circuit Court of Appeals was in error in the following respects:

I.

The Court erred in holding that the error on the part of the District Court in refusing special request No. 2, for instruction to the jury, was not prejudicial, so as to require reversal on Count 3 of the Indictment, and in affirming Count 3.

Special Request No. 2. R. p. 459.

Motion for New Trial embodying same. R. p. 26.

Opinion Circuit Court of Appeals, p. 7, R. p. 476.

This was error because:

The testimony made the basis of Count 3 did not negate the existence of the payment in 1942 of a mortgage indebtedness on the home, but only the witness' awareness of the fact at the time of his testimony. The evidence summed up by the learned Circuit Court of Appeals as estab-

lishing the fact of payment made in 1942 does not make issue with nor disprove the testimony set out in the indictment, nor does it establish any intent to falsify, and such evidence is no substitute for a proper instruction to the Jury, whose function it was, under proper instruction, to determine the real issue, to-wit: Was petitioner aware, at the time of testifying, of the fact that he had paid off a mortgage on his home in 1942, and designedly concealed or misrepresented this fact?

Or stated differently, the learned Court of Appeals erred in holding that the testimony relating to this Court was sufficient as a matter of law to sustain the indictment, or excuse the giving of this proper instruction.

II.

The Court erred in holding that plaintiff had any right to inquire as to the Ellis & Edwards, or Leftwich Cotton. That is, that this evidence was material to any issue in the civil cause. Because, these transactions were not had with the plaintiffs in the civil cause, nor is it claimed that any penalties were due thereon.

REASONS RELIED UPON FOR REQUEST TO GRANT THE WRIT.

It is submitted that the Court should entertain jurisdiction and grant the Writ for the following reasons:

I

The theory of the Indictment, Count 3, is that Petitioner testified that he did not pay off a mortgage on his home in 1942, whereas it is a fact that he did pay off

a mortgage in 1942. The testimony set out in the Indictment does not bear out this theory; the gist of it is that the witness said **he did not know** whether he had paid off a mortgage in 1942.

II.

The facts are that Petitioner and his wife had purchased their home from Brigance, in her name, and had executed a mortgage for balance of purchase price. This mortgage he satisfied or paid off in 1941.

See Exhibit 9—Fraser.
Testimony, Fraser, R. pp. 241-243.

In the testimony assigned as perjury in the Indictment, the witness only undertakes an historical account of the matter from the time of the purchase from Brigance, and his answers pertain to this mortgage, supra. The concluding answer to "Q. You haven't paid anything since 1940 or 1941? A. **I haven't**, no", has reference to the Brigance mortgage, and was in reality and so intended by the witness as a statement to the effect, that the witness had not personally made such a payment, but his wife attended to this if it had been done. This is made clear by what preceded and followed the excerpt adopted as the basis of the Indictment.

Further, as shown in Petitioner's testimony on his trial (supra) he explained to the questioning attorney that he didn't know, as to the later mortgage, but offered to go home and get his records, that is, ascertain the facts for him. R. p. 243.

III.

Petitioner was a sick man at the time of testifying,

suffering from Uremic poisoning, which affects the mind, particularly as to memory.

Testimony Dr. Ragsdale, R. pp. 328-331.
He was then 67 years old. R. p. 220.

IV.

Petitioner's testimony that he, at the time of testifying on the matters set out in the indictment, did not recall to memory the later mortgage, and its payment in 1942, has the utmost of plausibility. It is unrefuted in the record.

V.

The mere fact that the conceded fact of the existence of the later mortgage and its payment in 1942, is established by documentary evidence, is not a substitute for a proper charge to the jury as requested in Request No. 2, because it does not join a direct issue with the testimony assigned as perjury.

VI.

This Court granted certiorari in Goins vs. U. S., and, after argument, denied it, on the ground that the failure to give the instruction was not prejudicial. But the distinction is that Goins testified positively that he and his wife had not made a trip to Chicago with Millhorn in January, 1937, denying that he had ever been to Chicago. The Government had Millhorn as a witness, and also the registry clerk at the hotel where Goins stopped, and the registration card signed by Goins.

Had Goins testified that he did not know, or did not recall being in Chicago, the case would have some similarity to the instant case, and, we have no doubt, this

Court would have sustained the certiorari, and reversed.

Goins vs. U. S., 306 U. S. 623
Facts in 99 Fed. (2d) 147.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue out of and under the seal of this Court to the Honorable Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and file in this Court on a day certain, to be designated, a certified transcript of the case there entitled William Fraser, Appellant vs. United States of America, No. 9679, to the end that said case may be reviewed and determined by this Court and that Petitioner may have such relief as this Court may deem proper and just, and that the Opinion and Judgment of the said Circuit Court of Appeals and the District Court may be reversed and corrected.

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Of Counsel.

BRIEF AND ARGUMENT

ASSIGNMENT OF ERROR NO. I

REFUSAL TO GIVE PROPER SPECIAL INSTRUCTION.

> "The learned Court of Appeals erred in holding that the testimony relating to this Count was sufficient as a matter of law to sustain the indictment, or excuse the giving of this proper instruction."

As stated by the learned Circuit Court of Appeals:

> "The main question here is, whether Appellant's Motion for a directed verdict should have been granted."
>
> Circuit Court of Appeals Opinion, p. 7, R. p. 475

This proposition covers both the errors assigned in Appellant's Petition herein, in their final analyses.

The first one of which, supra, as to whether or not the judgment of the District Court should be reversed because of its failure to give the special request refused, is resolved against the Defendant on the grounds that the testimony of the witnesses Stovall and Pegg contributed the supporting or "substantial evidence", when taken in conjunction with Defendant's admission that he had signed the check which was used to pay off a mortgage indebtedness in 1942, contrary to his answer to the question: "Haven't you paid anything since 1940 or 1941? A. I haven't, no". R. p. 12.

But the deficiency here and which existed, of course, upon the request for directed verdict is, that there is no testimony to establish the facts:

(a) That defendant then knew or remembered his having signed a check for this purpose. R. p. 243.

The facts as to this being: that Defendant was then very sick, having gone to the hospital two days later in serious condition. R. p. 261. The sum total of his testimony, and that which accompanied that complained of, being that matters pertaining to the home were left to the attention of his wife, in whose name the title stood, and that he personally had not gone to the bank and attended to this matter, but had signed this check without any recollection thereof, as he puts it, without any "knowledge" of having done so. R. p. 261. Neither of these bankers say that he appeared in person or attended to this transaction in any manner, but the record discloses that he had undergone a very serious operation shortly before this time and had not been, and was not then, in any condition to transact business. R. pp. 229 to 231.

Besides, the very manner in which this transaction was handled is indicative of an inexperienced person's acts. Please note that Defendant's check was not payable to the holder of the indebtedness, in the first place; secondly, it was used to purchase a cashier's check payable to another bank, The First National (R. p. 93), not to the holder of the indebtedness, C. A. Tindall, this being done apparently by reason of the fact that the person effecting this transaction had in all probability been dealing with the First National Bank, no doubt paying the monthly notes thereat, and for this reason, when the first cashier's check was sought for the purpose of paying off the entire indebtedness, the person handling this assumed it was held or in the hands of the First National Bank, and when it was discovered that this was not the

case, the First National Bank issued its cashier's check in exchange for that of the National Bank of Commerce, payable to its order, to the holder of said indebtedness, C. A. Tindall. R. p. 101.

All these things indicate that a novice was handling the transaction. The natural, and no doubt the proper inference to be drawn from these circumstances is that Mrs. Fraser, fearing the death of Mr. Fraser, as shown by the record (R. p. 232) and recognizing the necessity of his return to the hospital in the next day or two (R. p. 230), was seeking to clear the home as a conceived protection against this eventuality.

Further, and the next deficiency in this particular is (b), there is nothing in the testimony of these two bankers to supply the essential element of an intent or purpose to mislead or deceive. And there is no other evidence in the Record to this effect.

Finally (c), this testimony supplies or adds nothing to Defendant's concession, made after he had time to go home and examine his records, including this check, as he offered and requested to do on the occasion of the giving of the answer (supra) complained of (R. p. 243), that he signed the check used to pay this mortgage, but obviously when he was too sick to appreciate or be impressed with his act in so doing. R. p. 261.

In other words, they contribute nor furnish any fact or circumstance not already conceded, and fully explained by Defendant (R. p. 243), nor do they contradict or refute any statement made by him.

Therefore, the learned Appellate Court's conclusion

that the error of the District Court in refusing this instruction was harmless or excused, as a matter of law, because there were two witnesses, Stovall and Pegg, who supplied the necessary corroborating facts or circumstances, is clearly without justification.

When we add to this fact, that Defendant's first answer to the question:

> "Did you pay off the balance of your indebtedness in 1942?" (Recited as a part of Count 3.)

was

> **"I don't know."** R. p. 12.

showing conclusively that he was uncertain and was not pretending to give full and definite information as to the disposition of the funds being inquired about (that derived from the sale of the Ellis-Edwards cotton to Leftwich)—it is not perceived how the Trial Court, or the Honorable Court of Appeals, determined, as a matter of law, that he was not entitled on this Count to a directed verdict.

This difficulty increases when we consider the further facts exhibited by the Record herein, that the Defendant had repeatedly stated that he was unable to give a detailed accounting of these funds, from memory, or recall all of the dispositions made thereof, with accuracy, and that he was not attempting to do so. For instance:

> "The Court: What else, now?
>
> A. Judge, I don't know. I can't answer that. I am trying to dig back and find out.
>
> * * *
>
> The Court: What else did you pay?

A. I am perfectly willing to answer if I can."

R. p. 248.

"* * *

The Court: And you haven't paid any other bills?

A. Yes, sir, but I don't know what they are.

The Court: They would be minor bills?

A. Some of them were, and some were not."

R. pp. 250 and 251.

Hence, we agree with the learned Court of Appeals, that:

> "The main question here is whether Appellant's Motion for a directed verdict should have been granted."

And most sincerely urge that the District Court should have granted, and the Appellate Court reversed for failure to do so, Defendant's request for a directed verdict. R. pp. 213 and 337. As well as for the Trial Court's refusal to give the special instruction submitted. R. p. 459.

ASSIGNMENT OF ERROR NO. II.

MATERIALITY OF EVIDENCE.

This proposition presents the question as to whether or not the evidence on which this Count 3 is based, was material to any proper or legitimate issue involved in the civil litigation.

The learned Court of Appeals has accepted Defendant's contention in this particular as pointed out supra, in this language:

> "Appellant insists 'it wasn't Barton money, and the statement, although misleading, **was literally true, and the Government's evidence does not place the transaction in a different light.**"

Court of Appeals Opinion p. 10. R. p. 478.

But takes the benefit of this concession away from Defendant by further holding, to the effect:

> **"The main issue was whether the sales agreement between Barton and his associates and the Fraser-Britton associates was a contract for the sale of the cotton by the Defendants as Barton's agents, or whether it was an outright sale to them. Appellant's testimony as to his disposition of the money relates to the nature of the contract if he treated the money received as his own, that fact would have some tendency to support his understanding of the contract. We think that the testimony alleged in Counts 1 and 3 given by Appellant was material within the meaning of the statute and the law as above indicated, and that it was not error to so hold."**

Court of Appeals Opinion, p. 7. R. pp. 474-475.

Most respectfully we say, that this learned Court's premises in this paragraph are clearly erroneous.

First, there was no controversy or issue to the effect that Defendants Fraser and Britton were in any manner the agents of Barton or his associates. On the contrary it was expressly conceded that the transactions between Barton and his principal, the Three Way Land Company, or associates, and the G. H. Britton Cotton Company, were outright sales. R. pp. 221, 226 and 227.

In the second place, the very inquiry on which the indictment was based shows beyond any peradventure of a doubt that the Defendant was treating the proceeds of the Ellis-Edwards or Leftwich cotton as his own, having admitted or shown that he was using same to pay his private and personal obligations. This is the very es-

sence of the questions propounded to him, and his answers thereto, and is not disputed or denied by any witness in the record.

It is likewise completely disclosed by the Record that this cotton was purchased and paid for by the G. H. Britton Cotton Company, all the checks having been signed by Mr. G. H. Britton (R. p. 161), and the warehouse receipts covering this cotton some months later turned over to this Defendant by Mr. G. H. Britton, himself, after which same was sold and the proceeds appropriated and used by Mr. Fraser as his own, as aforesaid, about which there is no dispute.

There is no claim or effort sought in the original complaints to reach this particular cotton, as either Ellis-Edwards cotton or Leftwich cotton, or the proceeds thereof. These are not mentioned in either the original complaints, amendments thereto, the intervening petition or amendments thereto. R. pp. 338 to 362. And, for this reason, it is difficult to see how this matter outside of these pleadings could really become material.

However, frankness requires that we acquaint the Court with the theory on which this contention is made, which is, that Britton used some of the proceeds of the Barton cotton with which to purchase this particular lot (R. pp. 149, 160 and 161) and as a consequence, or in effect now, because of Britton's conversion or misappropriation of these proceeds, Fraser should be sent to the penitentiary for Britton's derelictions in this particular, by reason of the fact that some months later Britton delivered the warehouse receipts covering this cotton to Fraser, who sold it and appropriated the proceeds. R. pp. 244, 249, 250, 148, 150, 158, 160 and 161.

Yet, there is no effort nor prayer in either of the complaints to impress this particular cotton or the proceeds thereof with any lien or recover it for the use and benefit of the original Plaintiffs or Intervenor, the United States of America. It is believed, and confidently urged, that this conversion, and the consequences thereof cannot be visited upon Fraser, and certainly ought not to be used as the basis of sending him to the penitentiary, simply because he was unable to account accurately and remember in detail every disposition thereof.

Under no circumstances can it be material to any issue made in the original Complaint or the intervening Petition. These transactions simply made Britton liable for his conversion. It may be, that under a proper proceeding, and proper facts and circumstances, these funds could be traced and a lien sought and impressed thereon, but the civil proceedings were not of that nature, nor sought any such specific relief. R. pp. 338 to 362.

Hence, this inquiry was wholly foreign to any issue raised thereby.

Seasonable objections were made to any inquiry regarding the handling of the Ellis-Edwards or Leftwich cotton, or the proceeds thereof:

> "MR. RODGERS: We want to object to any testimony with reference to 291 bales of cotton, and particularly to Mr. Leftwich's handling the sale of same, on the ground that this information, or any information pertaining to the handling of this 291 bales of cotton is wholly foreign to any issue in this lawsuit; and it is immaterial and irrelevant as to any issue in this case, and we want to object to any and all testimony regarding this 291 bales of cotton."

"MR. RODGERS: I object to any inquiries with reference to whom this cotton was sold by Mr. Fraser or the Britton Cotton Company, or any amounts obtained for the cotton by either, on the ground that it is wholly irrelevant, immaterial and incompetent. The Government is not concerned and cannot be concerned about any sale of cotton for (from) the first buyer, G. H. Britton Cotton Company, or William Fraser, and has no right to inquire into any sale made of this cotton by any other person after it was first sold to William Fraser or the G. H. Britton Cotton Company."

R. p. 254.

Also R. pp. 18, 21, 213, 214 and 337.

These objections should have been sustained.

Thompson vs Bowie, 71 U. S., 463, 18 L. E. 424.

Wherefore, it is respectfully submitted that the Honorable Court of Appeals, and the District Court, erred in holding this inquiry material to the issues raised by the complaints in the civil causes.

Hence, for the reasons assigned, Defendant prays that this Honorable Court will grant the Writ of Certiorari heretofore prayed and will reverse the Opinion and Judgment of the Honorable Court of Appeals and discharge this Defendant.

Respectfully submitted,

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Of Counsel.

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Memphis, Tennessee.
Attorney for Petitioner.

Received of Wils Davis, Attorney for Defendant, William Fraser, one copy of the Record and three copies of the Petition for Certiorari, and Brief and Argument in support thereof, with notice of its filing, this ..... day of November, 1944.

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In the Supreme Court of the United States

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No. 677

WILLIAM FRASER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 468–480) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 10, 1944 (R. 467). The petition for a writ of certiorari was filed November 13, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crim-

inal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the trial court correctly refused to grant petitioner's motion for a directed verdict or to grant his requested instruction that in a perjury case a conviction "must be based upon testimony of two or more witnesses, or if only by one witness, then such witness must be corroborated by other substantial evidence."

2. Whether the trial court correctly instructed the jury that, as a matter of law, petitioner's allegedly perjurious testimony in a prior civil suit was material to the issues in that suit.

STATUTE INVOLVED

Section 125 of the Criminal Code, 18 U. S. C. 231, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years

STATEMENT

On August 31, 1943, petitioner was indicted in four counts in the District Court for the Western District of Tennessee for perjury predicated upon testimony he had given in December 1942 and in April 1943 in a civil suit (R. 2–16). After a jury trial, he was convicted upon counts 1, 3 and 4 (R. 21–23), and was sentenced on each of these counts to imprisonment for five years and to pay a fine of $2,000, the sentences to imprisonment to run concurrently (R. 31–33). On appeal to the Circuit Court of Appeals for the Sixth Circuit his convictions on counts 1 and 4 were reversed, but his conviction on count 3 was affirmed (R. 467–480). This count (R. 10–13) charged that on April 22, 1943, petitioner, as a witness in a civil suit pending in the District Court for the Western District of Tennessee, falsely testified, in response to questions seeking to ascertain the disposition made by him of the proceeds of property involved in that litigation, that he had not paid anything on a mortgage on his home since 1940 or 1941; that this testimony was as to a material matter in the litigation and that petitioner did not believe it to be true.[1]

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[1] The testimony of petitioner upon which count 3 was based, as set out in the indictment, was as follows (R. 11–12):

Q. Mr. Fraser, did you pay off the balance of the indebtedness on your home in 1942?

A. I will answer you this way——

Q. Just answer my question.

A. Did we pay it off in 1942?

The evidence adduced in support of count 3 may be summarized as follows:

On November 17, 1942, P. M. Barton and others filed a bill of complaint in the District Court for the Western District of Tennessee against petitioner, G. H. Britton and W. J. Britton, individually and doing business as G. H. Britton Cotton Company, alleging that the defendants in April 1942 had contracted to sell for the plaintiffs some 1,859 bales of cotton which had been pledged by the plaintiffs to the Mid South Cotton Growers Association to secure a loan in the sum of $62,871.59; that the defendants took possession of the cotton and sold it in May and June 1942; that the cotton had a market value of approximately $130,000; that the lien had been discharged by the defendants, leaving a balance to be accounted for by them of ap-

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Q. Did you pay off the balance of the indebtedness on your home in 1942?

A. I don't know. I made a trade, and I think these people reduced the indebtedness to around $2,500.00 or $2,600.00 That was made in 1940 or 1941.

Q. Are you sure it wasn't made in 1942?

A. No; 1940 or 1941.

Q. Whom did you make that trade with?

A. Brigance. He was sick, and they didn't have any money.

Q. Where is he?

A. He is dead.

Q. Who have you been paying the money to?

A. Mrs. Brigance.

Q. You haven't paid anything since 1940 or 1941?

A. I haven't; no.

proximately $67,128.41, of which $57,928.50 should have been held in escrow by the defendants, as agreed in the contract, for the payment of a government tax against the cotton; that the tax had not been paid nor had the amount thereof been placed in escrow; and that the sum of approximately $9,200, the balance in excess of the tax, had not been paid to the plaintiffs. The plaintiffs demanded an accounting (R. 338–344). An amended complaint alleged that petitioner was fraudulently concealing the proceeds of the cotton in a safe deposit box in a certain bank and that he was insolvent; a temporary injunction was sought to prohibit the removal of the contents of the box (R. 345–347). Thereafter, the United States intervened, making all parties defendants, and set up its claim for a penalty of approximately $58,000 due under Title III of the Agricultural Adjustment Act of 1938, as amended (7 U. S. C. 1348), because of the growing of the cotton in excess of allotted acreages. The Government alleged that petitioner had received and was concealing the proceeds of the cotton in the safe deposit box, and a judgment was sought against all parties for the amount of the penalty; the Government also sought an injunction against petitioner and his agents and the bank from disposing of any funds in the box. (R. 348–358.) Subsequently, as the result of a pre-trial examination of petitioner (R. 378), orders were entered

directing that $28,875 found in his control and alleged to be a portion of the proceeds of the sale of the cotton in question, should be deposited in court pending disposition of the litigation (R. 379–380, 436). Petitioner then filed an answer to the Government's intervention, challenging the constitutionality of the Agricultural Adjustment Act and alleging that, in any event, he was not liable for the penalty because the persons from whom he had purchased the cotton had assumed payment thereof (R. 383–390). Petitioner also filed an answer to the original complaint, as amended, denying that the plaintiffs had any interest in the cotton, that he had agreed to put the proceeds of the cotton in escrow, or that he was liable for the tax. He alleged that the plaintiffs had sold the cotton to him and his co-defendants at prices ranging from $6 to $9 per bale above the lien existing against the cotton, and that he had offered this amount to the plaintiffs, but that they had refused to accept it. (R. 390–398.) G. H. Britton, petitioner's associate in the transaction and also a defendant in the action, filed an answer alleging that G. H. Britton Cotton Company had purchased the cotton outright at $7 per bale above the existing loan, but that it had not agreed to pay the tax; that 1,859 bales of Barton cotton had been received and sold for $120,861.69, of which $62,871.59 had been paid to discharge the lien; that

of the excess, there was due Barton the sum of $53,920.28, and that the balance of $4,069.82, representing the profit, belonged to the Britton Company (R. 399–407).

After a trial before the court without a jury, the court found (R. 426–437) that Barton had sold to petitioner and G. H. Britton as partners, 1,853 bales of cotton under an agreement whereby Barton was to receive $7 per bale after payment by the purchasers of the lien in the amount of $64,140.18 and the tax in the amount of $55,762.14, and the purchasers were to receive any excess; that petitioner and Britton had sold the cotton for $123,111.95 and had paid off the lien; that petitioner had attempted to dispose of and conceal the balance of $58,971.77; that $33,461 of the proceeds of the sale had been recovered from petitioner and Britton and had been deposited in court, but that $17,701.33, which petitioner had received in September and October 1942 from one Allan W. Leftwich, and which was "directly or indirectly" part of the proceeds, had been appropriated and concealed by petitioner, "along with other amounts received from the sale of the cotton" (R. 437). The court entered judgment in favor of the United States against petitioner and Britton, and Barton and his associates, in the amount of $55,762.14, and credited them with the amount of the money deposited, leaving an unpaid balance of $22,301.14 (R. 441–449). On an ap-

peal taken by petitioner and Barton and others to the Circuit Court of Appeals for the Sixth Circuit, the judgment was affirmed on October 3, 1944, in an opinion not yet reported.[2]

At petitioner's trial in the instant case, it was stipulated that he had testified at the civil trial on April 22, 1943, in response to questions of the plaintiffs' counsel, as alleged in count 3 of the indictment, that he had not paid anything on a mortgage on his home since 1940 or 1941 (R. 48; see fn. 1, pp. 3–4, *supra*). It was also stipulated that on September 28, 1942, a mortgage on petitioner's home had been released by the recording of a release executed by one C. A. Tindall, the holder of the mortgage (R. 49). The assistant cashier of the National Bank of Commerce of Memphis testified for the Government that on September 28, 1942, his bank had issued a cashier's check payable to the First National Bank of Memphis for $3,175.55, which had been purchased on the same day by petitioner's check in that amount (R. 93–94). The auditor of the First National Bank (R. 101) testified that on September 28, 1942, Tindall (the mortgage holder) had purchased a cashier's check in the amount of $3,175.55, for which he had tendered the check of the National Bank of Commerce in the same amount, and that on Tindall's deposit slip for

[2] We have lodged a copy of this opinion with the Clerk of the Court.

October 1, 1942, there appeared next to the item $3,175.55, the name "Fraser" (R. 101–103).

At the close of the Government's case (R. 212), petitioner moved for a directed verdict, which was overruled (R. 213–218). Petitioner took the stand in his own defense and testified, in explanation of his testimony at the civil trial that he had not paid anything on the mortgage since 1940 or 1941, that he had been thinking of an earlier mortgage which he had paid off in April 1941 and had not recalled the fact that he had paid off the mortgage in 1942 (R. 242–243). On cross-examination, petitioner admitted that he did give a check to Tindall in satisfaction of the mortgage, but said that "At the time I gave the check, I had no knowledge of it" (R. 261). The interrogation then continued as follows (R. 261):

> Q. Had what?
>
> A. No knowledge.
>
> Q. You mean you were unconscious?
>
> A. I don't know whether I was or not, but I went to the hospital two days afterward, bleeding badly, and I don't recall that check, but it is a fact that I did pay off the mortgage on my home at that time.
>
> Q. And you paid it out of the money you received in the transactions about which you testified?
>
> A. That's right.
>
> Q. That is, you paid it out of the money you received in your transactions with Barton, that is, either directly with the

Barton money, or money that came from the sale of the Leftwich cotton?

A. It wasn't Barton money; proceeds of the Leftwich transaction.

Evidence was offered by petitioner that he had been suffering from a prostate condition since 1940, on account of which he had been hospitalized in August and October 1942, and that this condition had affected his memory (R. 326–334). At the close of the evidence, petitioner renewed his motion for a directed verdict, and the motion was again denied (R. 337). The trial judge instructed the jury that it should acquit petitioner if it believed his contention that his testimony was not wilfully false, that he thought it was true at the time he gave it, and that there was no intention on his part to mislead or to misstate the facts; or, if it found that the Government had not proved the case beyond a reasonable doubt (R. 451). The trial judge also instructed the jury that petitioner's testimony in the civil suit, as a matter of law, was material to the issues in that suit (R. 452), to which petitioner duly excepted (R. 456–457). The judge refused to grant petitioner's special request No. 1 to the effect that it was a question for the jury whether his testimony was wilfully or intentionally false (R. 458–459), stating that this matter had already been covered by the charge (R. 457). The judge also refused to give petitioner's special request No. 2 that "You are instructed that you cannot

convict the defendant on the uncorroborated statement of any one witness. A conviction of perjury must be based upon testimony of two or more witnesses, or if only by one witness, then such witness must be corroborated by other substantial evidence" (R. 459), because he did not "think any such rule prevails today" (R. 458).

ARGUMENT

1. Petitioner contends (Pet. 17–21) that the circuit court of appeals erred in holding that the evidence in support of count 3 of the indictment was sufficient as against his motion for a directed verdict and to excuse the refusal of the trial judge to grant his special request No. 2, *supra,* relating to the quantum of proof in perjury cases. Petitioner does not direct his principal attack upon the sufficiency of the evidence to establish the falsity of the testimony, in respect of which the circuit court of appeals, after summarizing the evidence as consisting of "the stipulation that the mortgage had in fact been paid, Fraser's [petitioner's] admission that he did pay it off and corroborative testimony of the two bankers with supporting documents, tending to show that a checking transaction between Fraser and the lien holder for the amount of the mortgage had cleared through the banks on the day stated" (R. 480), said, "We think the evidence as to this count, consisting as it did of Fraser's admission or confession and the cor-

roborative testimony of the bankers, was such that it was unaffected by the failure of the court to give special request No. 2 [*Pawley* v. *United States*, 47 F. (2d) 1024 (C. C. A. 9)] * * *" (R. 480). Petitioner insists, however (Pet. 17–21), that the two-witness rule [3] requires that the elements in the offense of perjury of wilfulness and corrupt intent (cf. *United States* v. *Norris*, 300 U. S. 564, 574; *United States* v. *Smith*, Fed. Cas. No. 16,336 (D. Mass.); 2 Wharton's Criminal Law (12th Ed.), sec. 1512) must be established in accordance with the rule, and claims that the evidence relied upon to establish the falsity of his testimony did not prove that he knew or remembered having signed a check in 1942 for the purpose of paying off the mortgage or that he intended to mislead or to deceive.[4]

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[3] This rule, as stated in the opinion below (R. 477), quoting from *Goins* v. *United States*, 99 F. (2d) 147, 148 (C. C. A. 4), certiorari granted, 306 U. S. 623, certiorari dismissed, 306 U. S. 622, is "that the uncorroborated oath of one witness is not enough to establish the falsity of the oath as to which perjury is charged, and that, except where the falsity of such oath is indisputably established, as by documentary evidence, it must be shown by the testimony of at least two witnesses, or by the testimony of a witness corroborated by circumstances proved by independent testimony."

[4] Petitioner also indicates that the testimony in the civil suit upon which count 3 was based was not that he did not pay off the mortgage in 1942, but that he was uncertain as to whether he had done so (Pet. 12–13, 20). We do not think that the testimony, when read in its entirety (see fn. 1, pp. 3–4, *supra*), is susceptible of petitioner's construction, and that

In this posture of the case, it is manifest that the question presented is clearly not the same as the one now before the Court in *United States* v. *Weiler,* 143 F. (2d) 204 (C. C. A. 3), certiorari granted, October 9, 1944, No. 340. In that case, where petitioner did not admit the falsity of his testimony, but claimed that it was true, the question is whether the failure of the trial court to instruct the jury concerning the two-witness rule was prejudicial. But where, as in this case, the defendant admits his testimony to be false, it is settled that the rule does not apply. *Pawley* v. *United States,* 47 F. (2d) 1024 (C. C. A. 9); *Buckner* v. *United States,* 118 F. (2d) 468, 469 (C. C. A. 2); 7 Wigmore on Evidence (4th Ed.), p. 282.

Assuming that the evidence which showed that petitioner's testimony was false, did not establish, as petitioner claims, that it was given knowingly or with a corrupt motive, we submit that it is not necessary to establish those matters in accord-

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evidently was the view of the courts below (cf. R. 451, 476). However, even if the testimony were susceptible of the construction suggested by petitioner, it is well settled that, in such circumstances, the rule requiring a direct witness is not applicable, and that perjury may be proved by evidence sufficient to convince a jury beyond a reasonable doubt. *People* v. *Doody,* 172 N. Y. 165 (1902); *Berhle* v. *United States,* 100 F. (2d) 714 (App. D. C.); *United States* v. *Otto,* 54 F. (2d) 277 (C. C. A. 2); see also *Mallard* v. *State,* 19 Ga. App. 99 (1916); *State* v. *Wilhelm,* 114 Kan. 349 (1923); *R.* v. *Natanson,* 3 D. L. R. 308 (1927).

ance with the requirements of the two-witness rule. Both the text-writers and the courts have stated that the rule applies only to proof of the fact alleged as falsely sworn. 7 Wigmore, op. cit., p. 280; Best on Evidence (5th Ed.), sec. 604; Underhill, *Criminal Evidence* (4th Ed.), p. 1357; *Atkinson* v. *State,* 133 Ark. 341, 347 (1918); *State* v. *Raymond,* 20 Ia. 582, 587 (1866); *People* v. *Hayes,* 70 Hun (N. Y.) 111, 116–117 (1893), affirmed, 140 N. Y. 484 (1894); *Brake* v. *Commonwealth,* 218 Ky. 747, 749 (1927). In the *Pawley* case, *supra,* the defendant, as in this case, had admitted the falsity of his testimony, and had advanced as his sole defense that he did not understand the nature of the inquiry or the import of the question. Under these circumstances, the court held that the two-witness rule "had no application, and the refusal of the court to state an inapplicable abstract proposition of law would not constitute error" (47 F. (2d) at 1026). To the same effect is *O'Leary* v. *United States,* 158 Fed. 796, 799 (C. C. A. 1), in which it was said the rule does not apply to a case where the issue is "one of intent or forgetfulness * * * and not in any sense as to anything to which corroborative proofs would relate." See also *State* v. *Courtright,* 66 Ohio St. 35, 41 (1902); *State* v. *Vane,* 105 Wash. 170, 177 (1919). While it has been stated that "the allegation that the testimony of one charged with perjury was false and that the

appellant did not believe it to be true when he gave it under oath must be established by two witnesses or by one with circumstances of corroboration" (*Fotie* v. *United States,* 137 F. (2d) 831, 840 (C. C. A. 8); see also *Boehm* v. *United States,* 123 F. (2d) 791, 809–810 (C. C. A. 8), certiorari denied, 315 U. S. 800; *United States* v. *Hall,* 44 Fed. 864, 870 (S. D. Ga.)), we believe that it is apparent from an examination of the cases cited that the real question presented was the application of the rule to the falsity of the testimony, and that the language in respect of the belief of the defendant was intended to mean merely that the evidence which would establish falsity ordinarily would also tend to establish that the defendant did not believe his testimony to be true. Cf. *Vermont* v. *Chamberlin,* 30 Vt. 559, 571 (1858), where it was held that proof of the falsity of the oath makes a *prima facie* case of corrupt swearing. Whether the false testimony has been given wilfully and with a corrupt motive are matters normally capable of proof only by circumstances from which the requisite mental state can be reasonably and rationally inferred, unless they are admitted by the accused. *State* v. *Dryden,* 26 Del. 466, 468 (1912); *R.* v. *Knill,* 5 B. & Ald. 929, 930 note. As the court below held with respect to the element of wilfulness (R. 476–477), there was substantial evidence to require the submission of the case to the jury

under appropriate instructions, which, in fact, were given, p. 10, *supra*. It is conceded that petitioner did pay off the mortgage by issuing a check. Certainly, where a man gives a check for a substantial amount to pay off a mortgage on his home in September 1942, and some six months later testifies to the contrary in a suit in which he claims that he is not concealing money received by him in September 1942, a sufficient basis exists for a jury to find that he testified falsely with deliberation and with a corrupt intent. These matters having been decided by a jury and left undisturbed by two courts, there is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 590.

2. Petitioner also contends (Pet. 21–25) that the testimony which is the basis of count 3 of the indictment was not material to any proper or legitimate issue in the civil suit. He urges that the circuit court of appeals was in error in holding (R. 474) that "the main issue was, whether the sales agreement between Barton and his associates and the Fraser-Britton associates was a contract for the sale of the cotton by the defendants as Barton's agents, or whether it was an outright sale to them. * * *" Petitioner argues (1) that there was no issue as to the nature of the contract, but that it was expressly conceded

that the sale was "outright" (Pet. 22); and (2) that the testimony itself shows that the inquiry concerned petitioner's disposition of money which he had received from cotton that was not the subject of the litigation. We submit that the contentions are without merit.

The issue in the civil suit was to be determined, as the court below properly held (R. 474), by "the pleadings in the civil action" and not by the testimony of petitioner in his perjury trial, which he cites (Pet. 22), that the sale was "outright." Clearly, the pleadings in the suit (see pp. 4–6, *supra*), raised an issue as to whether the cotton had been sold to petitioner subject to the government penalty, as alleged by the plaintiffs, or as not subject to the penalty as claimed by petitioner. There is obviously no support for petitioner's argument, other than his own view of the matter, that no such issue existed.

There is, likewise, no basis for petitioner's claim that the money concerning which he was being interrogated was received from the sale of cotton not germane to the cotton involved in the civil suit. In this connection, he points to a statement in the opinion of the circuit court of appeals with reference to count 4 of the indictment that "Appellant insists 'it wasn't Barton cotton'; and the statement, although misleading, was literally true and the Government's evidence does not place the transaction in a dif-

ferent light''[5] (R. 478). Petitioner asserts (Pet. 21–22) that the foregoing excerpt from the opinion establishes that the court accepted his contention in this respect. As shown by the opinion (R. 478), the court was speaking of count 4 of the indictment (R. 13–16), which alleged that at a pre-trial examination in the civil case, petitioner falsely testified as to the amount of money he had obtained from the sale of the cotton. This count charged that petitioner's testimony that he had received only $30,000 from the sale of Barton cotton (obviously after the loan of $64,000 had been satisfied, see p. 7, *supra*), was false because he had received, in fact, the additional sum of $17,000. The circuit court of appeals pointed out (R. 478) that while petitioner admitted that he had received the additional sum, he insisted that the receipt thereof was an independent transaction (See R. 243–244, 261), and that this was literally true, but misleading. Therefore, it concluded (R. 479) that "since appellant insisted that his statement upon which count 4 was based was correct, * * * appellant was entitled to a directed verdict upon count 4 because the Government failed to introduce two witnesses or one witness and corroborative circumstances in support of count 4." But

[5] This excerpt from the opinion as quoted in the petition (Pet. 21), substitutes the word "money" for the word "cotton."

the court did not hold, as contended by petitioner, that the $17,000 in question had not been involved in the civil suit. Actually, as found by the district court in that case (R. 437), the sum of $17,000, which petitioner urges was in no way concerned in the case, was part of the proceeds received by petitioner through the sale of the Barton cotton. It was not Barton cotton, but it was Barton money.

CONCLUSION

The case was correctly decided by the court below. It does not involve the question now before the Court in *Weiler* v. *United States,* No. 340. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1944.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 677

WILLIAM FRASER, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent.

REPLY OF PETITIONERS TO THE OPPOSITION BRIEF FILED BY UNITED STATES,

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Of Counsel.

THE DAILY NEWS

SUBJECT INDEX

AUTHORITY CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 805

WILLIAM FRASER, Petitioner

VS.

UNITED STATES OF AMERICA, Respondent.

REPLY OF PETITIONERS TO THE OPPOSITION BRIEF FILED BY UNITED STATES,

TO THE HONORABLE JUDGES OF THE SUPREME COURT:

Your Petitioner feels that a brief reply should be made to the Government's argument.

I.

THE QUESTION OF THE TWO-WITNESS RULE

On page 13 of the Government's Brief, there is cited the case of U. S. vs. Weiler, 143 Fed. (2d), 204, (C.C.A.3), Certiorari granted October 9, 1944, No. 340. The Gov-

ernment seeks to distinguish the Weiler case from the instant case by saying that in the Weiler case the Petitioner did not admit the falsity of his testimony, but that in the instant case, the Petitioner Fraser has admitted that his testimony was false.

We submit that this distinction does not exist for two reasons, first, Weiler did admit the falsity of his testimony. Weiler's testimony was of that direct and positive nature that it called directly upon him to admit or deny, being that he had not purchased new tires in March, 1942. The facts cited in the Opinion show that he actually did purchase such tires, which he concedes, and his entire defense is an effort to explain.

In the instant case, the Petitioner has nowhere admitted the falsity of his original testimony assigned as perjury. He concedes that he signed a check in 1942, which was used to pay a mortgage then existing, but this is in no sense an admission of the falsity of his testimony, because his testimony in the Civil Trial was that he did not recall, or did not remember, or did not know at the time of testifying, and it was not that he did not do so. This is made plain beyond question by the fact that as Petitioner entered upon his trial in the District Court, he signed a Stipulation, paragraph 3 of which covers fully and sufficiently the extent of his concessions. R. p. 49.

Further, the evidence cited in the Opinion of the Circuit Court of Appeals as corroborative, was nothing more than cumulative to what the Stipulation already showed, that is, the mere fact that a payment was made in 1942.

Now Petitioner's testimony in the Civil Trial was that he did not know the facts as to this matter at the time. He was indicted upon a mere excerpt from that testi-

mony, and it is necessary, in order to arrive at the true purport of same, to consider not only the portion excerpted and embodied in the indictment, but also the other questions and answers along the same line, all of which taken together, are necessary to spell out his real testimoney. Please see Petition & Brief for such, pp. 8-16; 20-21

When taken in this light, and read with the other questions and answers made by the Petitioner in the Civil Trial, just precedings are following the excerpt used, it is clear that his actual testimony was simply that he did not know, and it was not a denial of the existence or payment of the mortgage in 1942.

His testimony simply embodied the experience of a great many business people, who, when unexpectedly called upon about a single transaction, can truthfully say that they do not know and can only offer, as did this Petitioner, to go get the records to speak for themselves.

In truth, the documentary evidence cited by the Learned Circuit Court of Appeals as being sufficient to dispense with the charge to the Jury on the Two-Witness Rule, was nothing more than a mere enlargement and accumulation of the facts as already stipulated at the beginning of the trial and in reality contributed nothing thereto.

II.

MATERIALITY OF EVIDENCE.

Over Petitioner's insistence that the testimony extracted of Fraser was not material to any issue in the Civil case, the Circuit Court of Appeals said:

> "The 'Propositions to be found' are disclosed in the pleadings in the Civil action. The main issue was, whether the sales agreement between Barton and his associates and the Fraser-Britton associates was a contract for the sale of the cotton by the Defendants as Barton's agents, or whether it was an outright sale to them. Appellant's testimony as to his disposition of the money relates to the nature of the contract. *If he treated the money received as his own, that fact would have some tendency to support his understanding of the contract.*"

This exceedingly tenuous connection is all that the Learned Circuit Court of Appeals seems able to find.

If Fraser had offered such testimony about his own acts in the disposition of money to support his understanding of the contract, the Trial Court would, and should, have promptly ruled it out as being a self-serving sort of "practical interpretation" made by one party after the fact. Such a privilege accorded to one of two contracting parties to manufacture evidence in his behalf by his conduct, after the fact, would be dangerous as a doctrine in litigation over contracts. The Trial Court would have ruled that such evidence was not only self-serving, but was immaterial and wholly irrelevant to any issue, as indeed it was, throwing no light whatever on the question at issue, to-wit: What was the contract?

Fraser either (1) owned the money, and owed Barton, or (2) held the money as selling agent for Barton. What Fraser did with the money would not, and could not, throw any light on whether it was (1) or (2).

The fact that the Learned Circuit Court of Appeals can find no stronger connection to show materiality is highly significant that none exists.

The Solicitor General, in his Opposition Brief, does suggest one other feature (Opp. Brief, p. 17), where he points out that the "pleadings" raise the question of whether Fraser was to pay the Government Tax or whether it was to be paid by Barton. How, we ask, could the testimony extracted of Fraser about his disposition of the money throw any light on that question? Which proposition does it prove or tend to prove? That Fraser was to pay the penalty? Or Barton?

Whether Fraser drew a check and paid off a mortgage in 1942, or left the money in the bank would throw no light on whether or not he had, some months before, agreed to pay a Government Tax.

REAL PURPOSE OF TESTIMONY

The real purpose of the inquiry was to further a "fishing expedition" to locate funds or property in possession of Fraser so that a judgment would be collectable by execution, but no one had a judgment at the time and the whole case was to determine *who was entitled to a judgment*, and the inquiry was premature.

Now, it is possible that if the attachment laws of Tennessee, which were available, had been used, the inquiry might have been relevant thereunder, but the pleadings in the case do not seek and obtain an attachment. R. pp. 356 and 357.

In one place (R. 356), the Government's suit does ask for an attachment against a certain lock box, but no attachment issued. Instead, the Government also prayed (R. p. 357):

> "That the Defendants be required to show cause why they have not paid or turned over to the United States of America the penalty or tax due it as aforesaid, and that they be required by mandatory process issued out of this Court to pay into the Court in this proceeding such sums of money as may be in their hands or under their control which came into their hands as the penalty on the marketing of the cotton involved in this suit;"

The process issued in response was not an attachment, but an injunction or restraining order (R. p. 364) and the method followed throughout was the exercise of a supposed mandatory power of the Court to order parties and witnesses to turn over money. (R. p. 379). Thus, instead of proceeding by attachment, the pleadings in this case proceed by the issue of the mandatory processes of the Court, and the supposed power of the Court to order money turned over from parties and witnesses, relying upon the sheer strength of the Court. There was no judgment, no attachment, no lien, just a "fishing expedition" carried on as a side line to the real questions involved in the Civil case, *none of which tended to establish the real issue.*

THE REAL ISSUE

In the original Petition (p. 22) Petitioner took the position that there was no issue existing in the Civil Trial over the question of whether the sale was outright or whether Fraser and Britton were mere selling agents; that on the contrary, it had been expressly conceded that the sale was an outright sale. R. pp. 221, 226, 227 and 228.

In the Government's Brief (p. 17), it is claimed that the pleadings alone must be looked to and these pleadings do not disclose this concession. That is true, the plead-

ings do not. But the concession was made in the course of the trial in the Civil case. We would not feel at liberty to rely upon the record in the Civil cause, but for the fact that the Government, in its Opposition Brief, on page 8 (Footnote 2) has stated that the Government has lodged with this Court a copy of the Opinion of the Circuit Court of Appeals in the Civil case; and the further fact, that the Civil case is now pending before this Court on Petition for Certiorari.

So, under these circumstances, we feel we are justified in referring to the Civil Record, No. 805, cause, pages 537 and 584, where the Attorney for the original parties, Barton, et al., concedes in the record that the transactions between Barton and Fraser were outright sales. This being true we now refer to the Opinion of the Circuit Court in the instant case, (R. p. 474) where that Court states that the main issue was whether it was an outright sale or a selling agency proposition. Thus we see that, in reality, that issue was eliminated by the concession of the original Plaintiffs, and no longer remained, and yet, that is the only issue stated in the case to which the Circuit Court ties the testimony extracted of Petitioner, and made the basis of the indictment, *to justify its materiality.*

Clearly, we most respectfully submit, this Honorable Court should grant Certiorari in this cause.

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